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No. 75-1028

In the Supreme Court of the United States

OCTOBER TERM, 1975

SCANWELL LABORATORIES, INC., PETITIONER

v.

JOHN L. McLUCAS, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner, a disappointed bidder on a government contract, contends that the court of appeals erred in affirming the dismissal of its action to recover damages under the Federal Tort Claims Act, 28 U.S.C. 1346, for the government's alleged failure to abide by its procurement regulations.

In 1969 the Federal Aviation Administration issued an invitation for bids ("IFB") to supply and install instrument landing systems at ten small airports. Of the four bids that were received, respondent Cutler-Hammer, Inc. submitted the lowest bid ($674,393), while petitioner submitted the next lowest bid ($931,470). Following the opening of the bids, petitioner protested the proposed grant of the contract to Cutler-Hammer on the ground that the Cutler-Hammer bid was not responsive to the IFB.

However, the FAA found that the bid was in material compliance and waived any alleged defect as a minor irregularity. FAA then awarded the contract to Cutler-Hammer (Pet. App. A-7 to A-8).

Petitioner thereupon brought suit under the Administrative Procedure Act to declare the award to Cutler-Hammer invalid and to enjoin the grant of the contract; the district court dismissed the complaint, holding that petitioner lacked standing to sue. On appeal, the court of appeals reversed (Pet. App. A-18 to A-51; 424 F.2d 859). The court concluded that a disappointed bidder on a government contract has standing to seek review of agency action in awarding the contract, that Section 10 of the APA, 5 U.S.C. 702, was a waiver of sovereign immunity to such a claim, and that such agency action was not "committed to agency discretion" so as to be beyond the reach of judicial review under Section 9(a)(2) of the APA, 5 U.S.C. 701(a)(2). Accordingly, the case was remanded to the district court for further proceedings.

On remand, respondents moved to dismiss the suit as moot, contending that the contract had been satisfactorily completed. The district court denied the motion and granted petitioner leave to amend its complaint. The amended complaint, which sought damages for the first time, alleged that the government had committed a tort in its handling of the IFB and had breached an implied contract with petitioner.[1] The district court dismissed the cause of action in tort for failure to state a claim on which relief could be granted and transferred the contract claim to the Court of Claims (Pet. App. A-6 to A-7).

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[1]Petitioner also sought damages from Cutler-Hammer, alleging unfair competition and a violation of the antitrust laws. The district court dismissed the tort claim against Cutler-Hammer and the court of appeals affirmed (Pet. App. A-15 to A-17). Petitioner voluntarily dismissed the antitrust claim (Pet. App. A-6 to A-7, n. 1).

On petitioner's second appeal, which challenged only the dismissal of its tort claims, the court of appeals affirmed (Pet. App. A-1 to A-17; 521 F.2d 941). The court concluded that if any claim sounding in tort were stated in petitioner's complaint, it was that the government had induced petitioner to prepare its bid in reliance on an implied representation that the bid would be considered under standards set forth in the IFB and FAA regulations and that the government had not acted in the manner it had represented, causing petitioner to lose both its expenses in preparing the bid and its anticipated profits on the contract. The court characterized this claim as one for negligent misrepresentation and held that the government had expressly declined to waive sovereign immunity for such claims under the Federal Tort Claims Act, 28 U.S.C. 2680(h) (Pet. App. A-12 to A-13).[2] Alternatively, the court held that the "discretionary function" exception to the Act, 28 U.S.C. 2680(a), would bar petitioner's claim (Pet. App. A-13 to A-14).

The judgment of the court of appeals is correct, is in accord with the decisions of other courts, and presents no issue warranting further review.

1. The court of appeals correctly analyzed petitioner's tort claim as one for misrepresentation, that is, that the government represented in good faith that it would act

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[2]The court also concluded that the Act required liability to be determined according to "the law of the place where the act or omission occurred," 28 U.S.C. 1346(b), and that it had been unable to find any decision of the courts of the District of Columbia that had allowed recovery for negligent misrepresentation (Pet. App. A-12, n. 7).

We note that through a typographical error the word "properly" was printed as "improperly" at Pet. App. A-13. The last sentence of the paragraph that continues from the preceding page should read: "Scanwell's claim therefore falls within one of the exceptions to government liability of the Tort Claims Act, and was properly dismissed by the district court against the government defendants."

in one way and, having induced petitioner to rely on that representation, acted in a different manner. See 1 Harper and James, *The Law of Torts*, §§ 7.6, 7.10 (1956); *Fitch* v. *United States*, 513 F.2d 1013 (C.A. 6), certiorari denied, No. 75-72, October 6, 1975; *Reamer* v. *United States*, 459 F.2d 709 (C.A. 4); *De Lange* v. *United States*, 372 F.2d 134 (C.A. 9). Accordingly, the claim was barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), which this Court has construed to cover negligent as well as intentional misstatements. *United States* v. *Neustadt*, 366 U.S. 696, 702.

2. If petitioner's claim were not treated as one for misrepresentation, it nevertheless would be barred by the "discretionary function" exception to the Act, which excludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*" 28 U.S.C. 2680(a) (emphasis added). The court of appeals found that the FAA necessarily exercised discretion in determining how and whether to award the contract (Pet. App. A-13 to A-14):

> It cannot be gainsaid that the FAA had to make some relatively high-level choices. It had to decide whether the waived requirements in [Cutler-Hammer's] bid were, on the one hand, minor irregularities or mere indifferences in responsibility of the bidders, or, on the other, were essential requirements of responsiveness of the bid. It had to decide, in addition, whether to set aside all bids and to readvertise. Perhaps the agency's actual choice amounted to an abuse of discretion which could be set aside in an injunctive or declaratory action, but we think there is no doubt that there was in fact some significant degree of choice and the contracting officer's obligation was not purely ministerial.

3. Finally, there is no conflict among the circuits. Not only has petitioner failed to cite any court of appeals decision in which a disappointed bidder had been awarded damages in tort for the improper grant of a government contract to a competitor, but also the three district court decisions on which petitioner relies (Pet. 19)[3] were suits for declaratory and injunctive relief that did not discuss, much less approve, an award of damages. Furthermore, in the two cases noted by the court of appeals (Pet. App. A-11) in which impropriety in the award of a government contract had been categorized as a tort, the courts held that no damages could be recovered. In *Edelman* v. *Federal Housing Administration*, 251 F. Supp. 715 (E.D.N.Y.), affirmed, 382 F.2d 594 (C.A. 2), as here, the court concluded that the cause of action was one for deceit or misrepresentation and was therefore barred by the Federal Tort Claims Act. Similarly, in *Rapp* v. *Salt Lake City*, 527 P.2d 651 (Sup. Ct. Utah), the court held that the claim, which sought only to recover expenses incurred in preparing and submitting an unsuccessful bid, was a tort action for deceit that was barred by the city's immunity.

Nor is the decision below contrary to the court of appeals' ruling in petitioner's first appeal. The decision on that appeal dealt solely with the standing of competing bidders to obtain review of a government contract award under the APA (Pet. App. A-13, n. 8). Since it was not until the case had been remanded to the district court that petitioner amended its complaint to seek damages, there had been no occasion for the court of appeals to

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[3] *Ainslie Corp.* v. *Middendorf*, 381 F. Supp. 305 (D. Mass.); *Black Hotel Co.* v. *Froehlke*, 351 F. Supp. 956 (W.D. Okla.); *Creque* v. *Government of Virgin Islands*, 354 F. Supp. 849 (D. V.I.).

discuss the availability of such relief under the Federal Tort Claims Act.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4]As the court below observed (Pet. App. A-14), its language in *Scanwell I* that "there is no discretion to ignore the regulations regarding responsiveness of bids" (Pet. App. A-45) related only to the availability of review under the APA for abuse of discretion. The Federal Tort Claims Act, however, expressly eliminates claims based on the exercise of a discretionary function, "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). Damages are, of course, unavailable under the APA. *International Engineering Co.* v. *Richardson*, 512 F.2d 573, 580-581 (C.A. D.C.); *Warner* v. *Cox*, 487 F.2d 1301, 1304-1305 (C.A. 5).

It should be noted that the court of appeals' holding does not deprive petitioner of all remedies. The Court of Claims recognizes an action in implied contract under the Tucker Act, 28 U.S.C. 1491, for recovery of bid preparation costs by certain unsuccessful bidders (Pet. App. A-10). Petitioner's contract claim was transferred to the Court of Claims, where it is still pending.

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